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In sum, the NERA Study falls far short of demonstrating that networks today have the upper hand in bargaining with their affiliates -- much less that they exercise such dominance as to justify government intervention in business negotiations between these parties.<sup>42</sup> We turn now to the specific objections which have been raised to repeal or modification of the clearance provisions of the network-affiliate rules -- the right to reject rule, the time option rule and the exclusive affiliation rule.

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<sup>42</sup> NASA also argues in its comments that the acquisition of CBS and Capital Cities/ABC, Inc. by the Westinghouse Electric Corporation and the Walt Disney Company, respectively, will create a "new breed of more powerful vertically integrated studio-networks" with strong financial incentives to "demand[ ]" clearance of all network programming. NASA Comments at 34-36. See, also Comments of the Association of Independent Television Stations, Inc., MM Docket No. 95-92 (October 30, 1995) at 4-5. The factors affecting bargaining between networks and their affiliates, however, will be no different under the networks' new ownership than under the old. Networks will still seek the most effective distribution for their programs in each individual market, and the terms on which a network and any of its affiliates do business will depend on the conditions prevailing in that particular market, including the alternative distribution outlets or program suppliers available to each. See, Reply Comments of CBS Inc., MM Docket Nos. 91-221 and 87-8 (July 10, 1995) at 3-10. The supposedly enhanced incentive of networks under new ownership to secure clearance for their programs -- an incentive which has always been properly strong -- will therefore in no way affect their ability actually to obtain such clearances.

III. The Objections Raised To Repeal Or Modification Of The Clearance Provisions Of The Network Affiliate Rules Are Without Merit.

1. The Right to Reject Rule

In its initial comments, CBS supported the Commission's proposal to retain the right-to-reject rule, while clarifying that the rule may not be invoked solely for financial reasons. CBS argued that an unrestricted right of affiliates to preempt network programming undermines the ability of broadcast networks to support the production of expensive, first-quality programming through advertising revenues alone.<sup>43</sup> Affiliate preemptions, we noted, not only reduce the size of the audience exposure the advertiser is purchasing, but also reduce the extra value of full simultaneous network exposure, which is important to advertising campaigns linked to particular events or promotions. CBS further argued that interpreting the right to reject rule to permit economically-based preemptions would serve no public interest, but would simply have the effect of allowing affiliates to enjoy greater financial benefits from the network-affiliate relationship than they otherwise would have been able to negotiate.

The primary objection raised by NASA and other parties to the Commission's proposed clarification of the right to reject rule is that it would be "unworkable."<sup>44</sup> Determining

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<sup>43</sup> As noted in our initial comments, during 1994 almost 5000 station hours of network programming were preempted by CBS affiliates in prime time alone.

<sup>44</sup> See, e.g., NASA Comments at 13; Sinclair Comments at 14; Comments of AFLAC Broadcast Group, Inc., MM Docket No. 95-92 (October 30, 1995) ("AFLAC Comments") at 4; Comments of Chronicle Broadcasting Company, et al., MM Docket No. 95-92 (October 30, 1995) at 3.

whether an affiliate's preemption of a network program was based solely on financial considerations, NASA suggests, would create "a staggering quagmire of administrative difficulties" and raise a "[chilling] specter of [government] ... inquisition into the motives behind a broadcaster's programming choices."<sup>45</sup>

CBS respectfully submits that a properly clarified right to reject rule would create no such difficulties. The legitimate categories for preemption -- news and public affairs programming, charitable telethons, paid political broadcasts and sustaining programs -- are clear cut. On the other hand, it cannot be seriously contended that preemptions for syndicated entertainment programming and movies are not primarily motivated by economic considerations.<sup>46</sup> And however the Commission ultimately decides to classify preemptions for sports programming,<sup>47</sup> this preemption category is no less susceptible to clear advance definition. In short, it is entirely possible to craft a clarified right to reject rule which would, in almost all

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<sup>45</sup> NASA Comments at 14.

<sup>46</sup> As one station owner acknowledges in its comments:

From time to time, the AFLAC stations, like most broadcasters, will overcommit on selling advertising time and, to solve the problem (which admittedly is of the station's own creation), will preempt the network and run a two-hour movie in order to create additional local advertising inventory. This practice is derogatorily referred to by the networks as "make good theater."

AFLAC Comments at 8. The reference may be derogatory, but it is not, we submit, inapt.

<sup>47</sup> For the reasons discussed in our initial comments, we do not believe that the right to reject rule should guarantee affiliates the right to preempt network programs to carry highly profitable sports broadcasts. See, CBS Comments at 20-21.

cases, create bright-line standards for affiliates, networks and the Commission.

NASA also suggests that an affiliate's decision to preempt a network program for financial reasons can serve the public interest by permitting the affiliate to present programming that its community "values more highly" -- i.e., that may achieve higher ratings -- than the network program in question.<sup>48</sup> This argument proves too much. The same reasoning could be advanced in favor of a rule providing a station with a governmentally-guaranteed right to preempt syndicated programming which it is contractually obligated to carry in order to present other programming which it believes would have greater audience appeal, and therefore be more profitable. Clearly, there would be no public interest basis for such a rule. The principle is no different with respect to economically-motivated preemptions of network programming.

As noted above, the NERA study stresses that network affiliation is an especially advantageous way to run a television station -- a proposition with which we certainly concur. Because of this fact, television operators voluntarily choosing affiliated status should receive no government sanction to extract additional profits from the network-affiliate relationship through economically-motivated preemptions of network programs they have agreed to carry. The Commission's proposal to clarify the right to reject rule should be adopted, with the modifications suggested by CBS in its initial comments.

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<sup>48</sup> NASA Comments at 15.

## 2. The Option Time Rule

CBS supported repeal of the time option rule in its initial comments on the ground that the rule is unnecessary in today's video marketplace. As we noted, even the 1957 Barrow Report -- which recommended the complete prohibition of time optioning -- found that the networks had invoked these provisions of their affiliation agreements "[o]nly in the most exceptional circumstances" and "[e]ven in these extremely rare instances, if the station remains adamant the network will not take recourse to legal steps which might appear to be open to it under the contract."<sup>49</sup> We also noted that, as long ago as 1970, the Commission essentially conceded that the rule had not achieved its principal goal, finding that "elimination of option time has not operated to make more time available to non-network programs and to multiply competitive program sources."<sup>50</sup>

Nonetheless, the proponents of the time option rule in this proceeding envision severely negative consequences if the rule is eliminated. Affiliated stations, they say, will be unable to develop a local program service because of the need to shift programs from one time period to another when a network option is exercised.<sup>51</sup> They also contend that emerging networks will be unable to find an outlet for their programs because established networks will

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<sup>49</sup> Barrow Report at 296.

<sup>50</sup> Report and Order in Docket No. 12782, 23 FCC 2d 382, 396 (1970). The Commission cited this failure of the option time prohibition as a reason for adopting the prime time access rule, which now has been scheduled for elimination in August 1996.

<sup>51</sup> NASA Comments at 22-23.

demand and receive options on desirable local time periods for the purpose of deterring the entrance of potential competitors.<sup>52</sup> Affiliated stations are depicted as essentially powerless to resist such incursions on their ability rationally to program their own stations.

The simple answer to these arguments is that there is no reason to believe that any of these things will happen. We will not repeat here all of the factors which have significantly increased affiliate bargaining power since the network-affiliate rules were first adopted. But we will note, once more, that despite the supposedly overwhelming leverage exercised by the three original networks over their affiliates, these same networks were forced to reduce their aggregate program offerings by 25 hours per week between 1977 and 1994 due to affiliate non-clearance.<sup>53</sup> And we once again recall that, in 1981, CBS had to withdraw a series of proposals to expand its evening news broadcast to one hour in the face of affiliates' "deep and widespread disapproval of the plan, even with economic compensation."<sup>54</sup> In short, the idea that networks will be able to force their affiliates to accept oppressive and anticompetitive time option provisions in the absence of government protection has no basis in reality.

In fact, as suggested by the Barrow Report's observation that time option provisions were rarely invoked when they were permissible, we believe that such clauses would

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<sup>52</sup> Sinclair Comments at 17-18; Comments of the United Paramount Network, MM Docket No. 95-92 (October 30, 1995) ("UPN Comments") at 27-29; Comments of the Warner Bros. Television Network, MM Docket No. 95-92 (October 30, 1995) ("WB Comments") at 13-15.

<sup>53</sup> See page 17 and note 39, supra.

<sup>54</sup> Wall Street Journal, April 7, 1982 at A-4.

be little utilized were the rule to be repealed. Such repeal would, nonetheless, allow a network to develop programming for new time periods -- with the assurance of obtaining clearance levels sufficient for commercial viability -- if it were able to convince its affiliate body to accept a time option for that period. Because the time option rule unnecessarily precludes such business negotiations between parties who are amply able to protect their own interests, it should be repealed.

3. The Exclusive Affiliation Rule

CBS supported repeal of the exclusive affiliation rule in its initial comments. The rule, we argued, is unnecessary in a competitive environment in which 69 percent of U.S. television households are in DMAs with six or more commercial television stations;<sup>55</sup> more than 70 percent of all television households receive 11 or more over-the-air channels;<sup>56</sup> and the rate of cable penetration in markets with fewer than six commercial television stations is approximately 66 percent.<sup>57</sup> This environment, we believe, provides ample opportunities for new networks to find outlets for their programming.

In their comments, however, both the United Paramount ("UPN") and the Warner

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<sup>55</sup> Nielsen Station Index, July 1995.

<sup>56</sup> Notice of Proposed Rulemaking in MM Docket No. 94-123, FCC 94-266 (released October 25, 1994) at ¶16 ("PTAR Notice"), citing Nielsen Media Research, Television Audience 1993, at 9.

<sup>57</sup> Nielsen Station Index, July 1995. The national cable penetration rate is 65.3 percent. Id.

Brothers ("WB") networks argue that the exclusive affiliation rule should be retained. While UPN reports reaching 72 percent of U.S. television households through primary affiliates,<sup>58</sup> and WB states that it has entered primary affiliations in 69 markets<sup>59</sup> (without providing audience reach figures for these stations), both maintain that secondary affiliations in a number of markets have been key to their ability to launch their networks. In a similar vein, NASA contends that, if exclusive affiliation agreements were permissible, viewers in some markets might be denied the ability to watch NFL football games on the Fox Network. Presently, the Fox Network is available through over-the-air affiliates in markets serving 97.4 percent of U.S. television households.<sup>60</sup>

As noted in our initial comments, cable distribution provides a viable, although not perfect, means of filling such coverage gaps.<sup>61</sup> In any event, however, the arguments made by UPN, WB and NASA do not support retaining the exclusive affiliation rule as currently written. As the Commission states in its Notice, 84 percent of television households are now in DMA markets with more than four commercial television stations.<sup>62</sup> And there are at least seven commercial television stations in 44 DMA markets, which account for 59 percent of all

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<sup>58</sup> See, Declaration of Lucie Salhany, submitted with UPN Comments, at 2.

<sup>59</sup> WB Comments at 2.

<sup>60</sup> Nielsen Television Index (Week of October 16, 1995).

<sup>61</sup> For example, the WB Network reaches approximately 19 percent of U.S. television households through cable carriage of its Chicago affiliate, WGN. WB Comments at 2.

<sup>62</sup> Notice at ¶12.



television households.<sup>63</sup> There can be no possible justification for continuing to apply the exclusive affiliation rule to markets of this size.<sup>64</sup>

The exclusive affiliation rule is a relic of a time when there were only two or three radio or television networks, and only a relative handful of markets had commercial broadcast stations available for affiliation with a potential new network entrant. Competitive conditions in 1995 bear no resemblance to those of this bygone era. Accordingly, the exclusive affiliation rule should be repealed, or at least modified in the manner suggested by the Commission's Notice.

### Conclusion

For the reasons set forth herein, and in CBS's initial comments in this proceeding, the Commission should (1) clarify the scope of the right to reject rule to exclude economically motivated preemptions; (2) abolish the time option rule, leaving issues of notice to negotiation; (3) eliminate the exclusive affiliation rule, or at least modify it as suggested in the Notice; (4)

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<sup>63</sup> Id.

<sup>64</sup> NASA argues for retention of the exclusive affiliation rule, even in large markets, on the ground that major network affiliates "can offer a prominent opportunity for audience development to a new network." NASA Comments at 29. While the emergence of new networks undoubtedly serves the public interest, we respectfully submit that it would be inappropriate for government to guarantee such new entrants -- which are themselves major media companies -- the right to use the programs and promotion of their competitors to build audiences for their own programming.

repeal the dual network rule; and (5) eliminate the first prong of the network territorial exclusivity rule, while retaining the second prong of the rule as currently written.

Respectfully submitted,  
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